

Western New England Law Review

Volume 17 17 (1995)
Issue 1

Article 5

1-1-1995

EMPLOYMENT DISCRIMINATION—MILLER v. MAXWELL'S INTERNATIONAL, INC.: INDIVIDUAL LIABILITY FOR SUPERVISORY EMPLOYEES UNDER TITLE VII AND THE ADEA

Steven K. Sanborn

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Steven K. Sanborn, *EMPLOYMENT DISCRIMINATION—MILLER v. MAXWELL'S INTERNATIONAL, INC.: INDIVIDUAL LIABILITY FOR SUPERVISORY EMPLOYEES UNDER TITLE VII AND THE ADEA*, 17 W. New Eng. L. Rev. 143 (1995), <http://digitalcommons.law.wne.edu/lawreview/vol17/iss1/5>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

EMPLOYMENT DISCRIMINATION—*MILLER v. MAXWELL'S INTERNATIONAL, INC.*: INDIVIDUAL LIABILITY FOR SUPERVISORY EMPLOYEES UNDER TITLE VII AND THE ADEA

INTRODUCTION

Victims of employment discrimination usually have an adequate means for bringing suit against their employer under Title VII of the Civil Rights Act of 1964 ("Title VII"),¹ the Age Discrimination in Employment Act of 1967 ("ADEA"),² and other federal³ and state⁴ statutes. In situations where the employer is undercapitalized or bankrupt,⁵ however, the victim may not obtain adequate compensation from his or her employer.⁶ As an alternative, these victims have sought compensation from the supervisor responsible for the discrimination.⁷

1. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993) (originally enacted as Pub. L. No. 88-352, 78 Stat. 253).

2. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993) (originally enacted as Pub. L. No. 90-202, 81 Stat. 602).

3. The Americans with Disabilities Act, for example, is analogous to Title VII and the ADEA in many respects, including its purposes, 42 U.S.C. § 12101(b) (Supp. V 1993), its remedies, 42 U.S.C. § 12117(a) (Supp. V 1993), and, specifically, its definition of the term "employer." 42 U.S.C. § 12102(5) (Supp. V 1993).

4. For a state-by-state review of sexual harassment law, see 2 ALBE CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE, §§ 10.1-.52 (1994).

5. See Phillip L. Lamberson, Comment, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419 (1994). Lamberson presents a hypothetical scenario in which Mary, an employee at Company X, suffered overt discrimination by her supervisor based on her sex. Mary received a \$350,000 verdict in her favor against Company X. Unfortunately for Mary, however, Company X filed for bankruptcy soon thereafter, resulting in few remaining assets available to pay Mary's claim. *Id.* at 419-20.

6. Plaintiffs have also brought suit against individual supervisors in situations where the employer is immune from liability because the supervisor's conduct is so outrageous as to be beyond the scope of their employment and the employer has taken affirmative steps to remedy the situation. *Cf.* *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), and *infra* notes 133-39 and accompanying text. Absent individual liability, there exists a "liability gap" because employers are not held liable in all situations. William L. Kandel, *Age Discrimination: Recent Decisions by Appellate Courts Under the Age Discrimination in Employment Act Through Mid-1993*, at pt. XIII (PLI Litig. & Admin. Practice Course Handbook Series No. 475, 1993).

7. There are other circumstances in which supervisors may be named as individual defendants, such as to destroy diversity and keep the case in state court. Courts generally have allowed this unless the individual defendants are only nominal. See *Bradley v. Consolidated Edison Co.*, 657 F. Supp. 197, 207 (S.D.N.Y. 1987); Charles S.

Courts that have found supervisors personally liable under Title VII and the other employment discrimination laws have followed the congressional mandate to broadly construe these statutes to afford the victims adequate compensation.⁸ Based on a plain reading of the statutes' definitions of "employer," these courts have held that supervisors, as "agents" of the employer, qualify as employers under the damages provisions.⁹

However, the Court of Appeals for the Ninth Circuit recently found that supervisors cannot be held liable under Title VII or the ADEA.¹⁰ In *Miller v. Maxwell's International, Inc.*,¹¹ the Court of Appeals for the Ninth Circuit in a split decision determined that supervisors are not "employers" as defined under either Act, and thus could not be held subject to the statutory damage provisions. The court further noted that the purpose of the "agent" provision in the definition of employer is to incorporate respondeat superior liability into the statute.¹²

This Note argues that courts should hold supervisors liable for their discriminatory acts under Title VII and the ADEA based on a number of factors.¹³ First, the plain language of the statutes states

Mishkind & Louise B. Wright, *Joinder of Individual Defendants in Employment Litigation: Is Removal Still Possible?*, 19 EMPLOYEE REL. L.J. 117 (1993).

Some plaintiffs may also be motivated by revenge against the discriminating supervisor. See Lamberson, *supra* note 5, at 420. There may also be situations where it is necessary to "pierce the corporate veil" and hold individual officers and directors personally liable for discriminatory practices. See, e.g., *Smith v. Capitol City Club of Montgomery*, 850 F. Supp. 976, 981 (M.D. Ala. 1994).

8. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765 (1979) (Blackmun, J., concurring); *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

The United States Supreme Court has stated that courts must "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981).

9. See *infra* notes 87-116. It should be noted that Congress has limited the liability of federal employees for common law tort violations. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, 4564 (1988), enacting 28 U.S.C. § 2679(b) (1988). The House Report stated that the bill "would remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and would instead provide that the exclusive remedy for such torts is through an action against the United States under the Federal Tort Claims Act." H.R. REP. NO. 700, 100th Cong., 2d Sess. 4 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5947.

10. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), cert. denied sub nom. *Miller v. La Rosa*, 114 S. Ct. 1049 (1994).

11. *Id.*

12. *Id.* at 587.

13. For an overview of individual liability of supervisors, see generally William L. Kandel, *Financial Exposure of Managers for Personnel Decisions*, 19 EMPLOYEE REL.

that supervisors should be subject to the damages provisions of the statutes. Second, the legislative history offers as much support for supervisor liability as against it. Finally, the ADEA offers even a stronger argument for individual supervisor liability than does Title VII.

Part I of this Note provides the background to Title VII and the ADEA. Part I also examines the case law related to the issue of individual liability under these Acts. Part II discusses the recent Court of Appeals for the Ninth Circuit decision, *Miller v. Maxwell's International, Inc.*¹⁴ Part III analyzes the *Miller* decision in light of the legislative background and pertinent case law. Finally, this Note concludes that the Court of Appeals for the Ninth Circuit erred in holding that individual supervisors cannot be held liable under either Title VII or the ADEA.

I. BACKGROUND

At one time, discrimination in employment was a way of life for many people: African-Americans and ethnic minorities were shut out of all but the most menial of occupations;¹⁵ women received considerably lower pay than men¹⁶ and suffered harassment without restraint at the hands of their male supervisors;¹⁷ and the

L.J. 267 (1993) (briefly examining individual liability under Title VII and tort law); Barbara B. Brown & Nancy L. Abell, *Investigating and Remediating Claims of Sexual Harassment*, at 77, pt. V (PLI Litig. & Admin. Practice Course Handbook Series No. 426, 1992) (reviewing individual liability under discrimination statutes and tort law); Douglas L. Williams, *Individual Liability and Defending Individual Co-Defendants (Defendant's Perspective)*, 463 ALI-ABA COURSE OF STUDY: ADVANCED EMPLOYMENT L. & LITIG. 205 (1989) (analyzing defenses for supervisors named as individual defendants in Title VII suits); John P. Furfaro & Maury B. Josephson, *Liability of Supervisors*, 210 N.Y. L.J. 3, 27 (1993).

For a general look at individual liability of personnel managers under various employment laws, including the National Labor Relations Act, the Occupational Safety and Health Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, and Title VII, see Gary W. Florkowski, *Personal Liability Under Federal Labor and Employment Laws: Implications for Human Resource Managers*, 14 EMPLOYEE REL. L.J. 593 (1989).

14. 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994).

15. Between 1890 and 1930, roughly two million African-Americans were employed in agricultural work, compared to less than 100,000 employed in professional or semi-professional fields. ARTHUR M. ROSS & HERBERT HILL, *EMPLOYMENT, RACE, AND POVERTY* 4 (1967).

16. It is estimated that in 1960, full time female workers earned only 61% of the income of men in the same category; this figure decreased to 57% by 1974. JOAN ABRAMSON, *OLD BOYS-NEW WOMEN: THE POLITICS OF SEX DISCRIMINATION* 80 (1979).

17. A 1980 study found 42% of all female federal employees surveyed had exper-

aged and disabled were considered a burden rather than capable and qualified members of the working world. Virtually none of these employment practices were regulated by either federal or state government. In fact, the existing Civil Rights Amendments and the Reconstruction era acts¹⁸ were so narrowly interpreted by courts that they offered little protection to anyone.¹⁹

The New Deal legislation of the 1930s was the first major advance into the regulation of employment practices.²⁰ An even more comprehensive attack on employment discrimination came in the 1960s, however, with the implementation of Title VII of the Civil

ienced some form of sexual harassment. CONTE, *supra* note 4, at § 1.1. A follow-up study in 1986 did not show any change in this rate. *Id.* A survey among female employees within the private sector proved even more startling, with 90% of the women responding having claimed some form of sexual harassment at work. *Id.*

Even with the passage of Title VII, courts did not recognize a cause of action for sexual harassment until the mid 1970s. *Id.* at § 2.1.

Unwilling to deem the "personal proclivit[ies]" of supervisors employment discrimination, the courts [initially] rendered decisions . . . that lacked consistency and sometimes conviction as judges waded through novel issues without the benefit of legislative history or statutory guidance, and advanced a number of reasons why sexual harassment was not sex discrimination under Title VII.

Id. (quoting *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated on procedural grounds*, 542 F.2d 55 (9th Cir. 1977)).

18. The Civil Rights Act of 1870, 42 U.S.C. § 1981 (Supp. V 1993), allows "all persons" the rights:

to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

Id.

The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988), creates liability against any person acting "under color of any [state] statute, ordinance, regulation, custom, or usage" who deprives another person of rights protected by the Constitution or federal laws. *Id.*

19. See *The Civil Rights Cases*, 109 U.S. 3 (1883); *Hodges v. United States*, 203 U.S. 1 (1906). These acts were resurrected in the late 1960s and the 1970s. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

20. See 1 LEX K. LARSON, *EMPLOYMENT DISCRIMINATION* § 1.01, at 1-3 (1994). The New Deal legislation included the Unemployment Relief Act of 1933, ch. 17, 48 Stat. 22, which prohibited discrimination on the basis of race in employing people under the Act; the National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935), which created the National Labor Relations Board to deal with labor and union disputes; and various executive orders aimed at eliminating discrimination by government contractors. This legislation did not impose specific requirements on employers, but rather "operated primarily to support and protect the right of workers to bargain collectively with their employer." LARSON, *supra*, § 1.01, at 1-2.

Rights Act of 1964²¹ and the Age Discrimination in Employment Act of 1967.²² Since the passage of these Acts, Congress has continued to broaden their scope through various amendments, including the recent implementation of the Civil Rights Act of 1991.²³

A. Title VII²⁴

In the wake of the Birmingham uprisings of May, 1963, President Kennedy proposed a civil rights bill.²⁵ The resulting Civil Rights Act of 1964 was created primarily to offer minorities protection against racial discrimination.²⁶ The Act included titles addressing voting rights,²⁷ public accommodations,²⁸ and school desegregation.²⁹ Title VII, however, was undoubtedly the centerpiece of the Act.³⁰

Congress relied on its powers under the Commerce Clause of

21. Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993)).

22. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

23. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C. §§ 1981 and 2000e (Supp. V 1993)).

24. For an analysis of the legislative history of Title VII, see Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* (1985).

25. In his radio and television address of June 11, 1963, President John F. Kennedy made the following statement:

We face . . . a moral crisis as a country and as a people. It cannot be met by repressive police action. It cannot be left to increased demonstrations in the streets. It cannot be quieted by token moves or talk. It is time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives I shall ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law.

John F. Kennedy, *Radio and Television Report to the American People on Civil Rights*, PUB. PAPERS, 468, 469 (June 11, 1963).

26. HOUSE JUDICIARY COMM., H.R. DOC. NO. 914, 88th Cong., 1st Sess. 9 (1963). The broad purposes of Title VII were to remove barriers favoring the class of white employers over minority employees, and to compensate employees for injury resulting from unlawful employment discrimination. There was also a need to give a statutory basis for the Equal Employment Opportunity Commission, an agency created to handle employment discrimination claims. *Id.*

27. Pub. L. No. 88-352, Title I, 78 Stat. 241 (codified as amended at 42 U.S.C. § 1971 (1988)).

28. Pub. L. No. 88-352, Title II, 78 Stat. 243, 243-46 (codified as amended at 42 U.S.C. §§ 2000a to 2000a-6 (1988)).

29. Pub. L. No. 88-352, Title IV, 78 Stat. 246, 246-49 (codified as amended at 42 U.S.C. §§ 2000c to 2000c-9 (1988)).

30. See 1 CHARLES A. SULLIVAN, ET AL., *EMPLOYMENT DISCRIMINATION* 1 (1988).

the Constitution³¹ in order to apply Title VII "to the fullest jurisdictional breadth constitutionally permissible."³² Because of the restrictive interpretations of the civil rights amendments and the early civil rights acts,³³ Congress needed to create new legislation in order to protect the rights of people who historically have been victims of discrimination in employment.

However, Congress did not include "sex" as a protected category in the original bill.³⁴ Many members of Congress believed that the nature of sex discrimination required its own legislation.³⁵ These congressmen feared that including sex in the Civil Rights Act would make the Act too controversial, threatening the entire cause.³⁶ Nevertheless, at the time the amendment was introduced,³⁷ the bill already had enough support to withstand the incorporation of gender protections.³⁸ Over time, the protections against sexual discrimination have indeed strengthened the Act.³⁹

As enacted, Title VII requires that a person alleging a claim file a charge with the Equal Employment Opportunity Commission ("EEOC").⁴⁰ After an EEOC determination of the merits of the claim, either the EEOC or the claimant may bring a civil action in

31. U.S. CONST. art. I, § 8, cl. 3.

32. LEE M. MODJESKA, *EMPLOYMENT DISCRIMINATION LAW*, § 2:02 at 2-3 (1993). In 1972, Congress applied its powers under the Fourteenth Amendment to extend coverage to state and local employees. *Id.*

33. *See supra* notes 18-19 and accompanying text.

34. Representative Howard Smith of Virginia submitted an amendment to the bill to include sex as a protected class. 110 CONG. REC. 2577-84 (1964), *reprinted in* 1 LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3213-28. As an opponent of the civil rights bill, Representative Smith intended to sabotage the bill by making it too radical to be passed into law. WHALEN & WHALEN, *supra* note 24, at 116; *see also* Leo Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-13 (1968) (describing the "peculiar" history of Title VII's sex provisions).

35. WHALEN & WHALEN, *supra* note 24, at 116. Representative Emanuel Celler, the bill's sponsor, opposed the inclusion of the amendment when first proposed. He claimed it would strike down many state laws that already protected women from dangerous employment conditions. *Id.*

36. *Id.*

37. *See supra* note 34.

38. Representative George Meader claimed: "Smith outsmarted himself. At this point there was no way you could sink the bill." WHALEN & WHALEN, *supra* note 24, at 117.

39. Representative Katherine St. George in support of the amendment predicted that "[t]he addition of that little, terrifying word 's-e-x' will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right." 110 CONG. REC. 2581 (1964), *reprinted in* 1 LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 3221.

40. 42 U.S.C. § 2000e-5(b) (1988).

court against the respondent(s).⁴¹

Originally, courts could hold employers charged in the complaint liable under Title VII for backpay, reinstatement, or "any other equitable relief as the court deems appropriate,"⁴² if they were found to have committed an "unlawful employment practice."⁴³ Such practices today include discrimination based on race, sex, religion or national origin in matters of compensation or terms of employment.⁴⁴ Furthermore, an employer cannot segregate employees⁴⁵ or make any employment decision where race, sex, religion or ethnicity is a motivating factor.⁴⁶

B. *The ADEA*

Because of its distinctive nature,⁴⁷ Congress did not include age as a protected characteristic under Title VII.⁴⁸ Congress did recognize the need to protect those over forty against discrimination, however, and requested that the Secretary of Labor create a

41. 42 U.S.C. § 2000e-5(f)(2) (1988). The person alleging the claim must receive a right-to-sue letter pursuant to § 2000e(5)(f)(1) before pursuing remedies in federal court.

42. 42 U.S.C. § 2000e-5(g) (1988 & Supp. V 1993)). With the passage of the Civil Rights Act of 1991, plaintiffs can also recover compensatory and punitive damages for intentional acts of discrimination. See 42 U.S.C. § 1981a (Supp. V 1993), discussed *infra* at notes 75-81 and accompanying text.

43. "Unlawful employment practices" are defined at 42 U.S.C. § 2000e-2 (1988 & Supp. V 1993).

44. 42 U.S.C. § 2000e-2(a) (1988) states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

Id.

45. 42 U.S.C. § 2000e-2(a)(2) (1988) makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.*

46. 42 U.S.C. § 2000e-2(m) (Supp. V 1993). Other unlawful employment practices affecting employers include: discrimination in training or apprenticeship programs, 42 U.S.C. § 2000e-2(d) (1988); discrimination that causes disparate impact, 42 U.S.C. § 2000e-2(k) (Supp. V 1993); and discriminatory testing procedures, 42 U.S.C. § 2000e-2(l) (Supp. V 1993).

47. See Peter H. Harris, Note, *Age Discrimination, Wages, and Economics: What Judicial Standard?*, 13 HARV. J.L. & PUB. POL'Y. 715, 732 (1990).

48. LAWRENCE M. FRIEDMAN, *YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT* 14 (Russell Sage Foundation, Social Research Perspectives Rep. No. 10, 1984).

report.⁴⁹ This report eventually led to the enactment of the ADEA⁵⁰ in 1967.⁵¹

Like Title VII, the ADEA was enacted in order to eliminate employment discrimination and to prohibit unfair employment practices.⁵² The Act itself is a "hybrid"⁵³ of Title VII and the Fair Labor Standards Act ("FLSA").⁵⁴ The objectives of the ADEA, to eliminate employment discrimination and prohibit unfair employment practices, parallel the objectives of Title VII.⁵⁵ The remedies and procedures, however, are modeled on the FLSA.⁵⁶

The ADEA prohibits unfair employment practices by employers,⁵⁷ employment agencies,⁵⁸ and labor organizations.⁵⁹ A person

49. U.S. DEP'T OF LABOR, REPORT TO THE CONGRESS ON AGE DISCRIMINATION IN EMPLOYMENT UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964 (1965).

50. For an overview of the ADEA as originally enacted, see Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380 (1976); see also Marilyn Mohrman-Gillis, Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 CATH. U. L. REV. 767 (1978) (considering the 1978 amendments to the ADEA).

For a discussion of how the Civil Rights Act of 1991 impacts the ADEA, see Howard Eglit, *The Age Discrimination in Employment Act, Title VII, and the Civil Rights Act of 1991: Three Acts and a Dog that Didn't Bark*, 39 WAYNE L. REV. 1093 (1993).

51. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993)).

52. 29 U.S.C. § 621(b) (1988). The purpose of the ADEA was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.*

53. *Lorillard v. Pons*, 434 U.S. 575, 578 (1978). Justice Marshall, in the majority opinion, stated that Congress' intention in enacting the ADEA was, "on the one hand, . . . to use an existing statutory scheme and a bureaucracy with which employers and employees would be familiar and, on the other hand, [to reflect Congress'] dissatisfaction with some elements of each of the preexisting schemes," i.e. the NLRA, the FLSA, and Title VII. *Id.*

54. 29 U.S.C. §§ 201-19 (1988 & Supp. V 1993). The FLSA was passed in 1938 as an effort to improve the working conditions under which a large number of the nation's workforce were employed. 29 U.S.C. § 202 (1988). The Act created and administered a minimum wage, 29 U.S.C. § 206 (1988); set limits on number of working hours, 29 U.S.C. § 207 (1988); established child labor restrictions, 29 U.S.C. § 212 (1988); and provided for liquidated damages against employers, 29 U.S.C. § 216 (1988).

55. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard*, 434 U.S. at 584; see also H.R. REP. NO. 40(II), 102d Cong., 1st Sess. 3-4 (1991), reprinted in 1991 U.S.C.C.A.N. 694, 696-97.

56. *Lorillard*, 434 U.S. at 579 (1978). See COMMITTEE ON LABOR AND PUBLIC WELFARE, S. DOC. NO. 723, 90th Cong., 1st Sess., reprinted in 113 CONG. REC. 31,250 (1967) (enforcement procedures based on FLSA replaced the procedures in the original bill that were based on the NLRA).

57. 29 U.S.C. § 623(a) (1988). Section 623(a) makes it unlawful for an employer: (1) to fail or refuse to hire or to discharge any individual or otherwise discrimi-

can bring a civil action under section 626(b)⁶⁰ to recover backpay, unpaid overtime compensation, and liquidated damages (for willful violations).⁶¹

C. "Employers" Under Title VII and the ADEA

"Employer" is defined under Title VII⁶² to include any "person"⁶³ who has fifteen or more employees⁶⁴ for a required period of time, "and any agent⁶⁵ of such a person."⁶⁶ Congress amended the

nate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Id.

58. 29 U.S.C. § 623(b) (1988). "Employment agency" is defined as "any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person." 29 U.S.C. § 630(c) (1988).

59. 29 U.S.C. § 623(c) (1988). "Labor organization" is defined as "a labor organization engaged in an industry affecting commerce, and any agent of such an organization." 29 U.S.C. § 630(d) (1988).

60. 29 U.S.C. § 626(b) (1988). As in Title VII, a person must receive a right-to-sue letter from the EEOC pursuant to 29 U.S.C. § 626(d) (1988) before seeking federal court remedies.

61. Moreover, § 626(b) states: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in §§ 211(b), 216, . . . and 217 [of the FLSA]." § 626(b).

62. Congress most likely borrowed the "employer" definition from the NLRA. *See infra* note 86. *Contra* *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983) (finding that "employer" was borrowed from the Unemployment Compensation Act, 26 U.S.C. § 3304 (1988)), *cert. denied*, 466 U.S. 904 (1984).

63. "Person" is defined as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers." 42 U.S.C. § 2000e(a) (1988).

64. "Employee" is defined as "an individual employed by an employer," except for persons elected or appointed to a state public office. The term does include U.S. citizens employed in a foreign country. 42 U.S.C. § 2000e(f) (Supp. V 1993).

65. Congress did not define "agent" in Title VII. However, the Equal Employment Opportunity Commission defines an agent as "a person or entity which acts or has the power to act on behalf of another." EEOC Compl. Man. (BNA), § 605.8(c) at 605-22. For discussion of the agent clause as used in Title VII, see 1 LARSON, *supra* note 20, at § 5.03[2]; BARBARA L. SCHLEI AND PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1002 (2d ed. 1983), 388 (Five Year Supp. 1989), 136 (1987-89 Supp. 1991).

66. 42 U.S.C. § 2000e(b) (1988). The statute states in full:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of

definition in 1972⁶⁷ in order to lower the requirement for number of employees from twenty-five⁶⁸ to the present fifteen.⁶⁹ This amendment achieved more effective application of Title VII to small businesses.⁷⁰ "Because of the existing limitation in the bill proscribing coverage of Title VII to [twenty-five] or more employees or members, a large segment of the nation's work force is excluded from an

twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Id.

67. The Equal Employment Opportunity Act of 1972 was created to allow more individuals to recover under Title VII. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 5 U.S.C. §§ 5108 & 5314 and various sections of 42 U.S.C. § 2000e). "Facts, statistical evidence and experience demonstrate that employers, labor organizations, employment agencies and joint labor-management committees continue to engage in conduct which contravenes the provisions of Title VII. The existence of such practices demonstrates the immediate need to effectuate the purposes of the Civil Rights Act of 1964." H.R. REP. NO. 238, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144 (1972).

68. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e(b) (1988)).

69. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (codified at 42 U.S.C. § 2000e(b) (1988)). The House of Representatives actually recommended reduction of the requirement to eight employees. See H.R. 1746, 92d Cong., 2d Sess. (1971). The Senate amended the House bill requirement to 15 employees as a compromise with senators concerned with the effect on small businesses. S. 2515 § 2, 92d Cong., 1st Sess. (1971); see also the remarks of Sen. Paul Fanin, 118 CONG. REC. 2409-10 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1297-1301; the remarks of Sen. Norris Cotton concerning the detrimental effect on small business, 118 CONG. REC. 2391 (1972), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 969, 1009-11; the remarks of Sen. James Allen, 118 CONG. REC. 2389-90 (1972), *reprinted in* 3 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1269-72.

70. The Senate, in reviewing the recommendation for reducing the number of employees requirement, stated that such a reduction was necessary because "discrimination should be attacked wherever it exists . . . [and] small establishments have frequently been the most flagrant violators of equal employment opportunity." S. REP. NO. 415, 92d Cong., 1st Sess. (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 410, 417 (1972).

Senator Jacob Javits pointed out that small businesses were more likely to discriminate "because of the smallness of the enterprises and the lack of sophisticated personnel techniques." 118 CONG. REC. 581 (1972), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 641, 646.

effective [f]ederal remedy to redress employment discrimination.”⁷¹ The House Judiciary Committee felt “that the [EEOC’s] remedial power should also be available to all segments of the work force.”⁷²

There is little evidence in the legislative history of Title VII to establish how far Congress intended to stretch the definition of “employer.”⁷³ With the passage of the Equal Employment Opportunity Act of 1972⁷⁴ and the Civil Rights Act of 1991,⁷⁵ however, Congress clearly intended to broaden the scope of Title VII in order to give a greater number of victims more substantial legal remedies.⁷⁶

The Civil Rights Act of 1991 was enacted to “provide monetary remedies for victims of *intentional* employment discrimination to compensate them for resulting injuries and to provide more effective deterrence.”⁷⁷ The Act allows employees to recover com-

71. H.R. REP. NO. 238, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2155.

72. *Id.*

73. In 1964, Senator Joseph Clark, when asked a question on who qualifies as an employer under Title VII, responded that the term “employer” should be given its common dictionary meaning. 110 CONG. REC. 7216 (1964).

“Employer” is defined to include the following options: 1) the owner of an enterprise (“as a business or manufacturing firm”); or 2) “an agent acting for such an enterprise in employing persons.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 743 (1976) (emphasis added).

74. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 5 U.S.C. §§ 5108 & 5314 and various sections of 42 U.S.C. § 2000e); see *supra* note 67 and accompanying text.

75. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C. §§ 1981 and 2000e). For a comparison with the Civil Rights Act of 1990 that was vetoed by President Bush, see The Committee on Federal Legislation, *The Civil Rights Act of 1991*, 48 REC. OF THE ASS’N OF THE BAR OF THE CITY OF NEW YORK 75 (1993); J.R. Franke, *The Civil Rights Act of 1991: Remedial Civil Rights Policies Prevail*, 17 S. ILL. U. L.J. 267 (1993). For a review of issues left unresolved by the 1991 Act, see Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993). For other articles discussing various aspects of Title VII, see Symposium, *The Civil Rights Act of 1991: Theory and Practice*, 68 NOTRE DAME L. REV. 911 (1993); Symposium, *The Civil Rights Act of 1991: Unraveling the Controversy*, 45 RUTGERS L. REV. 887 (1993).

76. For a section-by-section analysis of the damages provisions of the Civil Rights Act of 1991, see Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53 (1993).

The Civil Rights Act of 1991 overturned a number of United States Supreme Court decisions that had restrictively interpreted Title VII. See, e.g., Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095 (1993).

77. H.R. REP. NO. 40(I), 102d Cong., 1st Sess. 14 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 552. In testimony before the Committee on Education and Labor, one witness noted:

[C]ompensatory and punitive damages will not give back to a plaintiff, in many cases, the career that they lost or the ability to rise further in that career.

pensatory⁷⁸ and punitive⁷⁹ damages from employers for acts of discrimination.⁸⁰ As the House Report states, the Act was intended to supply the same damages as awarded under 42 U.S.C. § 1981.⁸¹

Similar to Title VII, "employer" is defined under the ADEA as "a person engaged in an industry affecting commerce who has twenty or more employees The term also means (1) any agent of such a person."⁸² Most commentators conclude that Congress patterned the ADEA's definition after Title VII's "employer" definition,⁸³ as opposed to the definition of "employer" under the FLSA.⁸⁴

Congress doesn't have the ability to do that. Its [sic] a lasting permanent damage. I think what the increased remedies under the bill will do, however, is primarily act as a deterrent.

H.R. REP. NO. 40(I) at 69, *reprinted in* 1991 U.S.C.C.A.N. at 607.

78. 42 U.S.C. § 1981a(b)(2) & (3) (Supp. V 1993).

79. 42 U.S.C. § 1981a(b)(1) (Supp. V 1993).

80. Section 1981a(b)(3)(A)-(D) limits the amount of recovery depending on the size of the employer. For example, if an employer has between 15 and 100 employees for 20 weeks out of the year, the employer can be held liable for no more than \$50,000. 42 U.S.C. § 1981a(b)(3)(A) (Supp. V 1993). If the employer has between 100 and 200 employees, the employer can be held liable for no more than \$100,000. 42 U.S.C. § 1981a(b)(3)(B) (Supp. V 1993).

Amendments have already been introduced in both the House and Senate to eliminate these caps on damages. S. 2062, 102d Cong., 2d Sess. (1992); H.R. 3975, 102d Cong., 2d Sess. (1992); *see also* S. 2053, 102d Cong., 2d Sess. (1992) (amendment would remove caps on employers with over 50 employees).

81. H.R. REP. NO. 40(II), 102d Cong., 1st Sess. 24 (1991), *reprinted in* 1991 U.S.C.C.A.N. 717. The Judicial Committee report stated: "The Committee intends that compensatory damages be awarded under Title VII using the same standards that have been applied under [§] 1981." *Id.* at 28-29. Moreover, the standard for punitive damages was taken "directly from civil rights case law," including 42 U.S.C. § 1981 and 42 U.S.C. § 1983 cases. *Id.* at 29.

82. 29 U.S.C. § 630(b) (1988). The complete definition of "employer" under the ADEA is as follows:

a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

Id.

83. SCHLEI AND GROSSMAN, *supra* note 65, at 483 n.9; Monte B. Lake, *ADEA: A Review of the Substantive Requirements, in AGE DISCRIMINATION IN EMPLOYMENT ACT* 1, 5 (Monte Lake ed., 1982). *See supra* note 66 which provides the definition of "employer" under Title VII.

84. 29 U.S.C. § 203(d) (1988). "Employer" is defined under the FLSA to be "any

D. *Imposition of Personal Liability Under Title VII and the ADEA*

In addressing the issue of personal liability for supervisors, courts have interpreted the "employer" definitions of Title VII and the ADEA in two different ways. Some courts have interpreted "agents" to be "employers," and, thus, subject to liability. Other courts have found the agent provision simply to be a means of establishing respondeat superior liability or direct liability⁸⁵ on the employer based on agency principles.⁸⁶

1. "Agents" Are "Employers"

Courts that have found agents (i.e. supervisors)⁸⁷ to be employers have done so based on the plain reading of the statutory definition of employer. However, most courts have limited

person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.*

85. In *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987), the court found respondeat superior liability linked to the employer where "the person who engaged in the allegedly unlawful sexual harassment was not the plaintiff's statutory 'employer'" and direct liability where the person engaging in the harassment would be an agent and thus an "employer." *Id.* at 1558 n.4.

86. In *Friend v. Union Dime Sav. Bank*, 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310 (S.D.N.Y. 1980), a district court came up with yet another interpretation of Title VII's "employer" definition based on the NLRA definition of "employer." The court cited a 1947 amendment to the NLRA that restricted the employer definition. *Id.* Compare ch. 372, § 2, 49 Stat. 449, 450 (1935) (defining employer as "any person acting in the interest of an employer"), with ch. 120, § 101, 61 Stat. 136, 137 (1947) (defining employer as "any person acting as an agent of the employer."). The *Friend* court stated that "when Congress included 'any agent' in the NLRA it was an attempt to limit the employer's liability rather than to grant a new cause of action against all agents or employees of an employer." 24 Fair Empl. Prac. Cas. (BNA) at 1310.

The House Report to the NLRA amendment stated that the reason for the change was that under the prior definition, the employer was being held responsible for employees "not acting within the scope of any authority from the employer, real or apparent." H.R. REP. NO. 510, 80th Cong., 1st Sess., reprinted in 1947 U.S.C.C.S. 1135, 1137.

Other courts have also looked to the NLRA definition in interpreting "employer" under Title VII. *Rivas v. Federacion de Asociaciones Pecuarias de Puerto Rico*, 929 F.2d 814, 820 n.15 (1st Cir. 1991); cf. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982) (finding remedial provision of Title VII modeled after the NLRA).

87. Generally, supervisors are only held liable for their own harassing acts. Occasionally, however, a court will find a supervisor liable if an employee's co-workers create a "hostile work environment." See *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1016 (8th Cir. 1988) (holding that supervisor was aware of numerous incidents of harassment and therefore was liable for failing to take adequate steps to prevent it); *Robson v. Eva's Super Mkt., Inc.*, 538 F. Supp. 857, 863 (N.D. Ohio 1982) (finding supervisor liable under Title VII for refusing to take action in response to plaintiff's complaints of harassment by co-workers).

"agents"⁸⁸ to include only those people who serve "in a supervisory position and exercise[] significant control over the plaintiff's hiring, firing, or conditions of employment,"⁸⁹ or who have "participated in the decision-making process that forms the basis of the discrimination."⁹⁰

The Court of Appeals for the Fourth Circuit used the former definition of "agent" in *Paroline v. Unisys Corp.*⁹¹ In *Paroline*, the plaintiff brought a Title VII claim against both her corporate employer and her individual supervisor, alleging sexual harassment by the supervisor. The Court of Appeals for the Fourth Circuit held that the supervisor could be an employer for purposes of liability.⁹² "[A]s long as he or she has significant input into . . . personnel decisions," the supervisor is deemed to have "significant control" over the employee.⁹³ The supervisor in *Paroline* participated in

88. Courts have generally been unwilling to find co-workers liable under Title VII for acts of discrimination. *Guyette v. Stauffer Chem. Co.*, 518 F. Supp. 521, 525-26 (D.N.J. 1981); 1 LARSON, *supra* note 20, § 5.03[2][a], at 5-35 to 5-36.

89. *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *vacated in part on reh'g*, 900 F.2d 27 (4th Cir. 1990); *see also* *Williams v. City of Montgomery*, 742 F.2d 586, 589 (11th Cir. 1984) ("Where the employer has delegated control of some of the employer's traditional rights, such as hiring and firing, to a third party, the third party has been found to be an 'employer' by virtue of the agency relationship.") (quoting SCHLEI & GROSSMAN, *supra* note 65, at 1002), *cert. denied*, 470 U.S. 1053 (1985); *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982) (construing an "agent" to be "a supervisory or managerial employee to whom employment decisions have been delegated by the employer").

90. *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986) (quoting *Jones v. Metropolitan Denver Sewage Disposal Dist. No. 1*, 537 F. Supp. 966, 970 (D. Colo. 1982)). In *Hamilton*, a firefighter alleging racial harassment brought a Title VII claim against the fire department and his immediate supervisors. *Id.* The district court determined that the supervisors tried to "freeze out" Hamilton by refusing to provide assistance at radio operation, denying him car assignments and assigning him to the night shift. *Id.* at 442. Interpreting Title VII liberally, the Court of Appeals for the Fifth Circuit affirmed the district court's decision, noting that the supervisors had authority over Hamilton and that they used this authority to Hamilton's detriment. *Id.* at 442-43. "To hold otherwise would encourage supervisory personnel to believe that they may violate Title VII with impunity." *Id.* at 443.

In *Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990), the Court of Appeals for the Fifth Circuit abrogated *Hamilton* to the extent that agents can be held liable only in their "official" capacity. *Id.* at 228 n.2.

91. 879 F.2d 100 (4th Cir. 1989), *vacated in part on reh'g*, 900 F.2d 27 (4th Cir. 1990). For a review of the *Paroline* decision, see Becky Leamon, Note, *Employers' Liability for Failure to Prevent Sexual Harassment*, 55 Mo. L. REV. 803 (1990).

92. *Paroline*, 879 F.2d at 104. The court held that the evidence was sufficient to show that a genuine issue of material fact existed as to the supervisor's status as employer; thus, the district court's granting of summary judgment was inappropriate. *Id.*

93. *Id.* (construing *Tafoya v. Adams*, 612 F. Supp. 1097, 1105 (D. Colo. 1985), *aff'd* 816 F.2d 555 (10th Cir.), *cert. denied*, 484 U.S. 851 (1987)). The court suggested

Paroline's interview, recommended her for hire, and gave her work assignments.⁹⁴ Although he was not Paroline's "formally designated" supervisor, he had enough authority over Paroline to be considered her supervisor.⁹⁵

A number of the United States courts of appeals that have found individual defendants to be agents have held these defendants liable only in their "official" capacity.⁹⁶ However, several of these decisions relate only to suits against government officials. In *Barger v. Kansas*,⁹⁷ for example, the court held that the liability of state university administrators must be limited to acts within the scope of their "official" capacity.⁹⁸ The *Barger* court further noted that it was "highly unlikely" that the "official capacity" rule would ever work to deny a plaintiff an award of backpay.⁹⁹

In other cases, courts have distinguished ADEA claims against

that the supervisor does not have to have the "ultimate authority to hire or fire to qualify as an employer." *Id.*

94. *Id.*

95. *Id.* The court stated:

[A]n employee may exercise supervisory authority over the plaintiff for Title VII purposes even though the company has formally designated another individual as the plaintiff's supervisor. As long as the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff, that employee will hold "employer" status for Title VII purposes.

Id.

96. See *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 n.3 (10th Cir. 1993); *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990); *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982); *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1099 n.19 (5th Cir. 1981); cf. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690 n.55 (1978) (holding that "[o]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent"); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976) (determining that the Eleventh Amendment does not bar backpay award against state officials); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1060 (11th Cir. 1992) (finding that suits against government officials may be brought against them in their official capacity); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (finding that suits could be brought against a municipal officer only in his or her official capacity).

Other courts have specifically rejected the official/individual distinction. See, e.g., *Hanshaw v. Delaware Tech. & Community College*, 405 F. Supp. 292, 296 n.10 (D. Del. 1975) ("Persons acting as officials are liable for their tortious actions as individuals; their official capacity relates only to potential immunity for certain kinds of discretionary decisions for which they might otherwise be liable.").

97. 630 F. Supp. 88 (D. Kan. 1985).

98. *Id.* at 90-92. "Only when the official is working in his official capacity can he be said to be an 'agent' of the government or governmental agency, and therefore an 'employer' within the meaning of 42 U.S.C. § 2000e(b)." *Id.* at 92.

99. *Id.* Courts have also found individuals liable in their official capacity in light of the compensatory and punitive damages provisions of the Civil Rights Act of 1991. In *Stefanski v. R.A. Zehetner & Assoc., Inc.*, 855 F. Supp. 1030 (E.D. Wis. 1994), the court found that the statutory damage caps limit the amount of compensatory damages

individual supervisors from similar claims made under Title VII. Although the ADEA definition of employer is generally considered to parallel the Title VII definition,¹⁰⁰ courts have found individual liability under the ADEA based on the remedies and procedures of the FLSA that Congress incorporated into the ADEA.¹⁰¹

Two cases demonstrate this method of establishing individual liability under the ADEA.¹⁰² In *House v. Cannon Mills Co.*,¹⁰³ the court accepted the Court of Appeals for the Ninth Circuit's decision in *Padway v. Palches*¹⁰⁴ with regard to Title VII cases, but found that the *Padway* rationale does not apply to ADEA claims.¹⁰⁵ The *House* court noted that the damages provided under the ADEA were "much broader" than those which existed under Title VII at that time.¹⁰⁶ Furthermore, since the ADEA incorporated the "remedies and procedures" of the FLSA,¹⁰⁷ this "evidences a congressional intent to adopt existing interpretations of FLSA provisions."¹⁰⁸

In addition, the court in *House* cited cases imposing individual liability under the FLSA, both when the ADEA was initially en-

based on the number of employees the "respondent" has, and "an employee in his or her individual capacity does not have any [employees]." *Id.* at 1032.

100. See, e.g., *Friend v. Union Dime Sav. Bank*, 24 Fair Empl. Prac. Cas. (BNA) 1307 (S.D.N.Y. 1980), discussed *supra* at note 86. Nevertheless, courts have been able to find distinctions in the two definitions. See generally, e.g., *Court v. Admin. Office of the Third Jud. Dist., Salt Lake County*, 764 F. Supp. 168, 170 (D. Utah 1991) (finding that the ADEA definition of employer does not include agents of states or state agencies, but Title VII's definition does include such agents).

101. See *supra* note 56 and accompanying text.

102. *House v. Cannon Mills Co.*, 713 F. Supp. 159 (M.D.N.C. 1988); *Wanamaker v. Columbian Rope Co.*, 740 F. Supp. 127 (N.D.N.Y. 1990); see also *Elias v. Sitomer*, 60 Fair Empl. Prac. Cas. (BNA) 758, 761 (S.D.N.Y. 1992) (applying the reasoning of *House* and *Wanamaker* to hold officer of company personally liable under the ADEA). Judge Fletcher also based her dissent on this distinction in *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 589-90 (9th Cir. 1993) (Fletcher, J., dissenting), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994); see *infra* notes 182-92 and accompanying text.

103. 713 F. Supp. 159 (M.D.N.C. 1988).

104. 665 F.2d 965, 968 (9th Cir. 1982); see *infra* note 117.

105. *House*, 713 F. Supp. at 160.

106. *Id.* Although *House* was decided prior to the Civil Rights Act of 1991, it is still accepted that the ADEA provisions are broader than Title VII's because the amount of compensatory damages available under Title VII are apportioned according to the size of the employer. *Miller*, 991 F.2d at 589 n.1 (Fletcher, J., dissenting). Compare 29 U.S.C. § 626(b) (1988) with 42 U.S.C. § 2000e-5(g) (Supp. V 1993) and 42 U.S.C. § 1981a(b)(3) (Supp. V 1993).

107. 29 U.S.C. § 626(b) (1988); *Lorillard v. Pons*, 434 U.S. 575, 582 (1978).

108. *House*, 713 F. Supp. at 160 (citing *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1296 (4th Cir. 1979)).

acted¹⁰⁹ and at the time it was amended in 1978.¹¹⁰ This suggests that Congress, assumedly aware of the findings of individual liability under the FLSA, would have amended the ADEA if it did not intend for the Act to create individual liability.¹¹¹ Absent clear legislative intent to the contrary, the court held that the "express language of the statute" suggests that "agents" are "employers," and "employers" who violate section 623 are liable for damages under section 626.¹¹²

In *Wanamaker v. Columbian Rope Co.*,¹¹³ the court followed the *House* approach by analogizing to the FLSA to find individual liability under the ADEA.¹¹⁴ "[L]iability [under the FLSA] is predicated not on the existence of the employer-employee relationship between [the supervisor] and the employee *but on the acts he performs in relation to the employee.*"¹¹⁵ The court found that the plaintiff properly stated a claim under the ADEA on the basis that the complaint alleged that all of the defendants "participated in the decision making process."¹¹⁶

2. Respondeat Superior

Some courts have found that neither Title VII nor the ADEA were ever intended to permit individual liability, and the sole purpose of the "agent" provision was to impose respondeat superior

109. *Id.* (citing *Chambers Constr. Co. v. Mitchell*, 233 F.2d 717 (8th Cir. 1956); *Brennan v. Community Serv. Soc'y of N.Y.*, 45 N.Y.S.2d 825 (N.Y. City Ct. 1943)).

110. *Id.* (citing *Shultz v. Chalk-Fitzgerald Constr. Co.*, 309 F. Supp. 1255, 1257 (D. Mass. 1970); *Hodgson v. Royal Crown Bottling Co.*, 324 F. Supp. 342, 347 (D. Miss. 1970), *aff'd*, 465 F.2d 473 (5th Cir. 1972); *Brennan v. Whatley*, 432 F. Supp. 465, 469 (E.D. Tex. 1977); *Usery v. Weiner Bros., Inc.*, 70 F.R.D. 615, 617 (D. Conn. 1976)).

The *House* court also cited more recent cases: *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir.), *cert. denied sub nom. Alberding v. Donovan*, 463 U.S. 1207 (1983); *Donovan v. Agnew*, 712 F.2d 1509, 1510-11 (1st Cir. 1983). *House*, 713 F. Supp. at 161 n.2.

111. *House*, 713 F. Supp. at 160.

112. *Id.* at 161-62.

113. 740 F. Supp. 127 (N.D.N.Y. 1990).

114. *Id.* at 135. The *Wanamaker* court reiterated that "the substantive prohibitions of the ADEA were derived *in haec verba* from Title VII." *Id.* at 134 (internal quotes omitted). Unfortunately, the court in *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172 (S.D.N.Y. 1992), cited the above-mentioned statement in finding that the precedent set in *Wanamaker* of individual liability under the ADEA was "instructive in interpreting Title VII." *Id.* at 1180.

115. *Wanamaker*, 740 F. Supp. at 135 (quoting *Shultz v. Chalk-Fitzgerald Constr. Co.*, 309 F. Supp. 1255, 1257 (D. Mass. 1970) (emphasis added)).

116. *Id.* (quoting *Bostock v. Rappleyea*, 629 F. Supp. 1328, 1334 (N.D.N.Y. 1985)).

liability onto the employer.¹¹⁷ In support of this holding, these courts have stated that the definition's requirement that an employer have a certain minimum number of employees (fifteen for Title VII,¹¹⁸ twenty for the ADEA¹¹⁹) suggests that Congress did not intend to burden "small entities."¹²⁰

The Court of Appeals for the Fifth Circuit in *Grant v. Lone Star Co.*¹²¹ found that individuals are not liable under Title VII's damages provisions. "Among the various parties subject to liability [under Title VII's damages provision], Congress could have made the individual employee committing or engaging in the discriminatory acts liable for damages. It did not."¹²² Because "Congress has proscribed conduct by 'persons' in other statutory schemes," the *Grant* court held that "Congress did not intend to impose individual liability for backpay damages under Title VII."¹²³

The district courts have offered various rationales for applying respondeat superior liability.¹²⁴ For example, the court in *Saville v. Houston County Healthcare Authority*¹²⁵ analyzed the issue of individual liability in light of the Civil Rights Act of 1991. First, the court noted that because the amount of damages available under the 1991 damages provisions is based on the size of the employer,

117. The Court of Appeals for the Ninth Circuit's opinion in *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982), has been cited regularly in more recent decisions that have found against individual liability under Title VII. In *Padway*, the plaintiff brought suit under Title VII seeking compensatory and punitive damages against a school superintendent and five members of the Board of Trustees in their individual and official capacities. *Id.* at 966. The *Padway* court first noted that individuals cannot be held liable for backpay because Title VII "speaks of unlawful practices by the employer, and not of unlawful practices by officers or employees of the employer." *Id.* at 968. The court went on to note that Title VII did not provide for compensatory or punitive damages (as of 1982 when *Padway* was decided). *Id.*

This decision is weak precedent, however, because of the opinion's lack of analysis on the issue. See *infra* note 167.

118. 42 U.S.C. § 2000e(b) (1988). See *supra* notes 62-66 and accompanying text.

119. 29 U.S.C. § 630(b) (1988). See *supra* note 82 and accompanying text.

120. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994); see also *Birbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-11 (4th Cir. 1994) (finding respondeat superior applies under the ADEA to actions of personnel supervisors).

121. 21 F.3d 649 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994).

122. *Id.* at 653.

123. *Id.*

124. See, e.g., *Lowry v. Clark*, 843 F. Supp. 228 (E.D. Ky. 1994). In discussing the applicability of the Civil Rights Act of 1991, the *Lowry* court stated that Congress could have eradicated discrimination by not limiting monetary damages and by removing the restrictions on employer size; instead, Congress "chose a more conservative path." *Id.* at 231.

125. 852 F. Supp. 1512 (M.D. Ala. 1994).

supervisors who make the same salary and engage in the same discriminatory activity could be held liable for largely disproportionate damage amounts depending upon the size of *their* employer.¹²⁶ Second, the *Saville* court reasoned that if Congress had intended to permit individual liability, it “would have provided some guidance as to how damages should be apportioned, or, whether a plaintiff could collect the cap amount from both the employer and the individual.”¹²⁷

An insightful argument for respondeat superior was made by the court in *Johnson v. Northern Indiana Public Service Co.*¹²⁸ In *Johnson*, the court interpreted the statute to incorporate respondeat superior liability because the definition of “employer” used the conjunction “and,” rather than “or,” in the phrase “*and* any agent of such a person.”¹²⁹ The court commented that the “[u]se of the word ‘and’ . . . ties the ‘any agent of such a person’ language to the previous language in the statute, suggesting that the ‘agent’ language was not meant to stand alone in terms of defining an ‘employer’ under the statute.”¹³⁰ However, if the word “or” was drafted into the “any agent” clause, then the clause “could stand alone so that an employer would be defined to include any agent of a person engaged in an industry affecting commerce who has [fifteen] or more employees.”¹³¹

3. Direct Liability

Courts have utilized agency principles based on the “agent” clause to find employers directly liable for the actions of their supervisors.¹³² The United States Supreme Court, in *Meritor Savings*

126. *Id.*; accord *Vodde v. Indiana Michigan Power Co.*, 852 F. Supp. 676, 681 (N.D. Ind. 1994) (finding that “[i]t is unlikely that Congress . . . intended such a ‘crazy quilt’ scheme of liability” as to impose disparate scales of damages on supervisors performing similar duties).

127. *Saville*, 852 F. Supp. at 1525. The court concluded that if “Congress [had] intended individual liability, it would not have left these questions unanswered and would have incorporated individual liability into the damage limitation scheme in some manner, perhaps by establishing individual damage caps.” *Id.*

128. 844 F. Supp. 466 (N.D. Ind. 1994).

129. *Id.* at 469.

130. *Id.*

131. *Id.*

132. See *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558-60 (11th Cir. 1987); *Yates v. Avco Corp.*, 819 F.2d 630, 634-36 (6th Cir. 1987); see also *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802, 806 (C.D. Ill. 1994) (finding individuals liable based on the RESTATEMENT (SECOND) OF AGENCY § 359c(1) (1958)). See *infra* notes 239-47 and accompanying text for an analysis on the applicability of agency principles.

Bank, FSB v. Vinson,¹³³ stated that by including the term "agent" within the definition of employer, Congress intended courts to look to common-law agency principles in determining employer liability.¹³⁴

In *Meritor*, the plaintiff brought a sex discrimination claim against her supervisor and the bank that employed her.¹³⁵ The Court did not specifically address the issue of the individual liability of the supervisor,¹³⁶ rather, the Court determined when employers could be held liable for the acts of their agents.¹³⁷ The Court stated that the incorporation of the agent provision "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."¹³⁸ Therefore, the *Meritor* Court held that employers cannot always be found liable under Title VII for their supervisors' actions.¹³⁹

Applying agency principles, the Court of Appeals for the Eleventh Circuit in *Sparks v. Pilot Freight Carriers, Inc.*¹⁴⁰ determined that a supervisor was an agent of an employer "where [the] super-

133. 477 U.S. 57 (1986).

134. *Id.* at 72. The Supreme Court conceded that "such common-law principles may not be transferable in all their particulars to Title VII," but Congress nevertheless intended them to apply. *Id.* For general criticism of the *Meritor* Court's directive to apply agency principles, see Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589 (1993).

135. *Meritor*, 477 U.S. at 60.

136. The respondent barely addressed the issue of the supervisor's liability in her brief. See Brief for Respondent at 32-33 & n.10, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979) ("Mr. Taylor's individual liability for his act as the employer is not entirely clear under Title VII, although it would be most peculiar to found [sic] liability as an agent in one whose principal was not jointly and severally liable.").

Meritor Savings Bank did not address the supervisor's liability in its brief, and the *amici curiae* briefs on behalf of both sides also did not discuss the issue.

At least one commentator has suggested the *Meritor* decision affirms individual liability of supervisors. See 1 SULLIVAN, *supra* note 30, at § 8.7.4 ("[A]s the [*Meritor*] majority opinion suggests, the harassers are themselves liable because they remain agents of the employer and therefore are 'employers' within the meaning of Title VII.").

137. *Meritor*, 477 U.S. at 69-73. The *Meritor* decision suggests that particularly egregious forms of discrimination that the institutional employer adequately sought to prevent would not subject that employer to liability. Unfortunately, in this situation the supervisor also could not be liable under Title VII, because the supervisor's conduct would not be within the course of his or her agency. See Kandel, *supra* note 6, at pt. XIII (discussing liability gap when employers attempt to distance themselves from outrageous conduct of their employees); *contra* EEOC Guidelines, 29 C.F.R. § 1604.11(c) (1993), quoted at *infra* note 141.

138. *Meritor*, 477 U.S. at 72.

139. *Id.*

140. 830 F.2d 1554 (11th Cir. 1987).

visor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates.”¹⁴¹ Since the supervisor in *Sparks* had “actual and apparent authority to alter Sparks’ employment status,” and allegedly used this authority to harass Sparks, the supervisor could be considered an agent.¹⁴²

II. *MILLER V. MAXWELL’S INTERNATIONAL, INC.*¹⁴³

A. *Facts and Procedure of Case*

Phyllis Miller took a position as hostess at Maxwell’s Plum Restaurant in August 1982.¹⁴⁴ During her employment, Miller alleged that her supervisors engaged in a series of harassing and discriminatory acts, including reduction of her hours, unequal pay,¹⁴⁵ harassing comments about her age and sex,¹⁴⁶ and, eventually, three terminations.

Soon after Miller filed a complaint with her union, she was

141. *Id.* at 1559 (quoting *Meritor*, 477 U.S. at 70). The *Sparks* court determined that by finding a supervisor to be an agent of the employer, the employer is directly liable for the actions of the supervisor. *Id.* The court quotes the RESTATEMENT (SECOND) OF AGENCY § 219(d)(2) (1958), which establishes the master’s liability for the acts of its servants when “the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.” *Id.* (emphasis added); see also EEOC Guidelines, 29 C.F.R. § 1604.11(c) (1993), stating:

[A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions [sic] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

Id.

142. *Sparks*, 830 F.2d at 1559-60. The Court of Appeals for the Eleventh Circuit accordingly overturned the summary judgment in favor of Pilot Freight Carriers, since the supervisor’s status as agent was a genuine issue of material fact. *Id.* at 1560.

143. 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom.* *Miller v. La Rosa*, 114 S. Ct. 1049 (1994).

144. *Id.* at 584.

145. *Id.* Miller claims to have managed the “Terrace Garden” in the spring and summer of 1983, although she was paid only hostess wages for her work. *Id.*

146. *Id.* Miller alleges that her general managers, Dino La Rosa and Carlo Galazzo, on several occasions made comments that she was too old or that she would not be promoted because she was a woman. *Miller v. La Rosa*, No. C-87-1906-VRW, 1990 U.S. Dist. LEXIS 7803, at *4 (N.D. Cal. May 18, 1990). After her first reinstatement, Miller alleges Galazzo threatened her that she would have a “hard time” if she returned to work. *Id.* at *5.

fired by her general manager, Dino La Rosa.¹⁴⁷ She filed charges with the EEOC and the National Labor Relations Board ("NLRB").¹⁴⁸ Although she was reinstated,¹⁴⁹ her supervisors denied her a full working schedule. She subsequently filed another NLRB charge, and Maxwell's fired her a second time nine days later.¹⁵⁰ She followed up with a second EEOC charge.¹⁵¹ Miller was later reinstated for a short time, but was terminated in the spring of 1986.¹⁵²

Miller claimed that her general manager, Carlo Galazzo, and the CEO of Maxwell's, Donald Schupak, withheld her unemployment benefits in the spring of 1986.¹⁵³ Miller received a right-to-sue letter from the EEOC on January 24, 1987.¹⁵⁴

Miller filed a *pro se* claim¹⁵⁵ in the district court for the Northern District of California on April 24, 1987, against six defendants in their individual capacities: Donald Schupak, chief executive officer of Maxwell's International;¹⁵⁶ Dino La Rosa, general manager of Maxwell's Plum until 1985; Carlo Galazzo, general manager after 1985;¹⁵⁷ Don Bohn, comptroller and assistant general manager; and

147. *Id.* Miller alleges that La Rosa terminated her because of her age and in retaliation for her requesting union intervention on the issue of the reduction of her hours. *Id.*

148. *Id.*

149. *Id.* Maxwell's reinstated Miller with backpay following the union's arbitration hearings. *Id.*

150. *Miller*, 991 F.2d at 584.

151. *Id.*

152. *Id.* Miller claimed that her third termination was based on retaliation, age discrimination and sex discrimination. *Id.* Miller further alleged that after her third termination, her general manager, Carlo Galazzo, informed a third party that Miller was the owner of the restaurant. This allegedly resulted in a suit against Miller by a former employee for back wages. *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *6.

153. *Miller*, 991 F.2d at 584. An unemployment appeals board hearing followed, in which Miller alleges that three lower level supervisors at Maxwell's gave false testimony regarding her. Miller alleged in her complaint that the unemployment appeals judge ruled that her third termination was wrongful. *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *6-7.

154. *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *7. This letter was sent on December 30, 1986, upon Miller's request, based on her 1984 and 1985 EEOC charges. *Id.* Miller claims that she did not receive this letter until January 24, 1987. *Id.*

155. *Id.* Miller apparently received some legal assistance out of court, however. *Miller v. Maxwell's Int'l*, 52 Fair Empl. Prac. Cas. (BNA) 1486 (N.D. Cal. 1990).

156. *Miller*, 991 F.2d at 584. Miller alleged that Schupak, as CEO, had sole responsibility over the discriminatory actions of the general managers involved. *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *7. The district court dismissed all of the claims against Schupak on the basis that Miller alleged insufficient facts to necessitate relief. *Id.* at *9.

157. *Miller*, 991 F.2d at 584. Miller alleged that La Rosa and Galazzo retaliated against her by "reducing her hours, refusing to promote her, . . . denying [her] culinary

Bui Duc Huy and Robert Stewart, dining room directors.¹⁵⁸ Miller was allowed to amend her complaint three times¹⁵⁹ before it was dismissed.¹⁶⁰

In deciding the issue of individual liability under Title VII and the ADEA, both Judge Schwarzer in his January 17, 1990 decision, and Judge Walker in his decision to dismiss, stated that the supervisors could be sued in their individual capacities if sufficient claims of discrimination were alleged against them.¹⁶¹

training . . . , writing false letters about [her] job performance, and otherwise harassing her." *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *4. The district court dismissed the claims against La Rosa because he was not named in the original EEOC charge, thus denying him the opportunity to assemble the necessary material for this action. *Id.* at *22. The court also dismissed the claims against Galazzo because Miller failed to properly state a claim for retaliation. *Id.* at *23-24.

158. *Miller*, 991 F.2d at 584. Miller alleged that Bohn, Huy, and Stewart notified her of her first termination, falsely testified in her EEOC hearings, and retaliated by failing to give her letters of recommendation. *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *8-11. The district court dismissed these claims based on Miller's failure to allege sufficient facts on which to grant relief. *Id.* at *10-11.

159. Miller's initial complaints alleged sex and age discrimination, wrongful termination, retaliation, breach of implied covenant of good faith and fair dealing, negligent and intentional infliction of emotional distress, conspiracy, and violation of the Racketeer Influenced and Corrupt Organizations Act. *Miller v. Galazzo*, No. C-87-1906-WWS, 1989 U.S. Dist. LEXIS 17034, at *1 (N.D. Cal. July 26, 1989). District Judge Schwarzer granted Miller leave to file an amended complaint with a short plain statement of her specific claims against the individual defendants. *Id.* at *2.

Her second amended complaint was hardly improved. *Miller*, 52 Fair Empl. Prac. Cas. (BNA) at 1486 (complaint was "clutter[ed] . . . with pejorative, argumentative and irrelevant assertions"). Judge Schwarzer allowed Miller to amend her claims of sex and age discrimination, infliction of emotional distress, and retaliation a third time; the other claims were dismissed. *Id.* at 1486-88.

160. *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *24-25.

161. *Miller*, 52 Fair Empl. Prac. Cas. (BNA) 1486 (Schwarzer, J.); *La Rosa*, 1990 U.S. Dist. LEXIS 7803 (Walker, J.). In his January 17, 1990, decision, Judge Schwarzer determined that claims could be brought against individual supervisors under Title VII and the ADEA. *Miller*, 52 Fair Empl. Prac. Cas. (BNA) at 1487. First, Judge Schwarzer distinguished *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982), because *Padway* involved a claim against a school superintendent, not a suit against a private employer. Additionally, *Padway* gave only a cursory analysis of the individual liability issue. *Id.*; see *supra* note 117 for a discussion of *Padway*. Second, Judge Schwarzer determined that although "it is unlikely that Congress intended to impose personal liability on employees," the text of Title VII did not preclude individual liability. *Miller*, 52 Fair Empl. Prac. Cas. (BNA) at 1487.

Judge Walker, in dismissing Miller's final complaint, reinforced Judge Schwarzer's reasoning that individual supervisors could be held liable. *La Rosa*, 1990 U.S. Dist. LEXIS 7803, at *2 n.1. Judge Walker noted that even though a settlement with a principal generally operates as a settlement with the agents, such is not the case when the evidence shows the plaintiff intended a contrary result. *Id.* (citing *Transpac Constr. Co. v. Clark & Groff Eng'rs, Inc.*, 466 F.2d 823, 829 (9th Cir. 1972)). Miller "repeatedly sought assurances from the [bankruptcy] judge that she would be able to continue this action against the individual defendants." *Id.* Nevertheless, Judge Walker found that

B. *Majority Opinion in Miller*¹⁶²

After addressing the jurisdictional issues and Miller's other claims,¹⁶³ the Court of Appeals for the Ninth Circuit determined that individual defendants could not be held personally liable under either Title VII or the ADEA.¹⁶⁴ The court first established that Title VII and the ADEA have the same liability schemes; "they both limit civil liability to the employer."¹⁶⁵ Citing *Padway v. Palches*,¹⁶⁶ the court stated that because civil liability was assessed only to the employer under Title VII, individual defendants could not be held liable for backpay.¹⁶⁷

The court recognized that some courts have held individual defendants liable to Title VII claimants,¹⁶⁸ but the majority concluded that many of these courts "held individuals liable only in their *offi-*

Miller did not provide sufficient evidence to support her claim against the individual defendants. See *supra* notes 156-58.

162. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994).

163. Although Miller failed to file a timely appeal, the Court of Appeals for the Ninth Circuit heard Miller's claim due to the "unique circumstances" created by the district court's erroneous order for extension of time to request alteration or amendment of the district court judgment. *Id.* at 585 (citing *Barry v. Bowen*, 825 F.2d 1324, 1329 (9th Cir. 1987)).

The *Miller* court further determined that Miller alleged sufficient willful conduct for her ADEA claim to have been accorded the three-year statute of limitations, instead of the two-year limitation imposed by the district court. *Id.* at 586. The court also held that the district court erred in barring the remainder of Miller's ADEA claim under the defense of laches because Congress provided a statute of limitations to apply to the action. *Id.* (citing *Int'l Tel. & Tel. Corp. v. GTE*, 518 F.2d 913, 926 (9th Cir. 1975)).

Miller's emotional distress claims were barred by California's one-year statute of limitations. *Id.*; see Cal. Civ. Proc. Code § 340(3) (West Supp. 1994).

164. *Miller*, 991 F.2d at 587-88.

165. *Id.* at 587. The court pointed out that when originally instituted, Title VII only allowed for backpay and reinstatement of employment, while the ADEA allowed liquidated damages for willful conduct. *Id.* With the passage of the Civil Rights Act of 1991, Congress made compensatory and punitive damages available under Title VII. See *supra* notes 75-81 and accompanying text.

166. 665 F.2d 965, 968 (9th Cir. 1982); see *supra* note 117 for a discussion of the *Padway* decision.

167. *Miller*, 991 F.2d at 587. John Pemberton, Jr., the regional district attorney of the EEOC who followed the *Miller* case, stated that his office considered the *Padway* decision "gratuitous dictum." His research showed that the parties did not even brief the individual liability issue in *Padway*. Steven G. Hirsch, *Job Bias Victims Can't Sue Managers*, THE RECORDER, Apr. 20, 1993.

168. *Miller*, 991 F.2d at 587 (citing *Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986), *limited by* *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990)); cf. *Barger v. Kansas*, 630 F. Supp. 88, 90-92 (D. Kan. 1985).

cial capacities.”¹⁶⁹ The Court of Appeals for the Ninth Circuit adopted the district court’s rationale¹⁷⁰ that the purpose of including “agents” within the employer definition was to incorporate respondeat superior liability into Title VII.¹⁷¹

The majority opinion further noted that the statutory scheme of the two acts suggests that Congress did not intend to impose individual liability on employees.¹⁷² Because both Title VII and the ADEA limit liability to employers with more than a certain number of employees,¹⁷³ the court inferred that Congress did not intend “to burden small entities with the costs associated with litigating discrimination claims.”¹⁷⁴ As a result of this limitation, Congress could not have intended to impose civil liability on individual employees.¹⁷⁵

The court concluded that even though *Padway* was decided prior to the passage of the Civil Rights Act of 1991,¹⁷⁶ it is still good law,¹⁷⁷ and it is applicable to both the Title VII and the ADEA claims.¹⁷⁸ In addition, the majority refuted the statement made by

169. *Miller*, 991 F.2d at 587 (citing *Harvey*, 913 F.2d at 227-28 & n.2; *Barger*, 630 F. Supp. at 91-92; *York v. Tennessee Crushed Stone Ass’n*, 684 F.2d 360, 362 (6th Cir. 1982)).

170. *Miller v. Maxwell’s Int’l*, 52 Fair Empl. Prac. Cas. (BNA) 1486, 1487 (N.D. Cal. 1990).

171. *Miller*, 991 F.2d at 587.

172. *Id.*

173. Title VII applies only to employers engaged in an industry affecting commerce with 15 or more employees. 42 U.S.C. § 2000e(b) (1988); see *supra* note 66 for the text of this section.

The ADEA limits liability to those “persons” with 20 or more employees. 29 U.S.C. § 630(b) (1988); see *supra* note 82.

174. *Miller*, 991 F.2d at 587.

175. *Id.*

176. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C. §§ 1981 and 2000e). The majority noted that because Congress specifically limited the damages available under the new Act depending upon the employer’s size, see 42 U.S.C. § 1981a(b)(3)(A)-(D), and because Congress did not include “individuals” within the statute’s limitations, presumably Congress did not intend to impose liability on individuals. *Miller*, 991 F.2d at 587-88 n.2.

177. *Miller*, 991 F.2d at 587-88 n.2. Judge Fletcher, in dissent, conceded that individual employees could not be held liable for backpay under Title VII prior to the Act’s amendment, but inferred that individuals may be held personally liable for compensatory and punitive damages in cases where the discrimination was intentional. *Id.* at 589 (Fletcher, J., dissenting).

178. *Id.* at 587-88. In a footnote, the majority disputed the dissent’s argument that the liability schemes under Title VII and the ADEA should not be interpreted similarly. According to the court, the arguments put forth in *House v. Cannon Mills Co.*, 713 F. Supp. 159 (M.D.N.C. 1988), upon which the dissent relied, are not persuasive because: (1) the Civil Rights Act of 1991 made available compensatory and punitive damages, which had distinguished the ADEA from Title VII when *House* was

the Court of Appeals for the Fifth Circuit in *Hamilton v. Rodgers*¹⁷⁹ that employees will "believe that they may violate Title VII with impunity."¹⁸⁰ The majority further noted that the scope of *Hamilton* was limited by the Fifth Circuit's decision four years later in *Harvey v. Blake*.¹⁸¹

C. Judge Fletcher's Dissent¹⁸²

Although Judge Fletcher disapproved of the majority's holding regarding individual liability under Title VII,¹⁸³ she was nevertheless hesitant to reject the court's reasoning.¹⁸⁴ Judge Fletcher as-

decided; and (2) although the ADEA incorporates some provisions of the Fair Labor Standards Act, see 29 U.S.C. §§ 201-19 (1988), it does not incorporate the "employer" definition into the ADEA. *Miller*, 991 F.2d at 588 n.3.

179. 791 F.2d 439 (5th Cir. 1986). See *supra* note 90 for a discussion of the *Hamilton* decision.

180. *Miller*, 991 F.2d at 588 (citing *Hamilton*, 791 F.2d at 443). The majority further stated:

[T]he [*Hamilton*] court's reasoning is unsound. No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief.

Id.

Accord *Vodde v. Indiana Mich. Power Co.*, 852 F. Supp. 676 (N.D. Ind. 1994). In *Vodde*, the court opined that "the normally deep-pocketed and publicity conscious employer (in general contrast to the ordinary supervisory employee bent on pursuing some private agenda) can be counted upon to be the most effective guardian of the marketplace." *Id.* at 681.

181. 913 F.2d 226, 228 n.2 (5th Cir. 1990); see *supra* note 90.

182. *Miller*, 991 F.2d at 588.

183. *Miller*, 991 F.2d at 589. "I am concerned that the majority's overbroad language may unnecessarily cloud decisionmaking under the Civil Rights Act of 1991 This significant revision may permit suits against individuals for compensatory and punitive damages where the discrimination was intentional." *Id.* (citations omitted).

Judge Fletcher also cited cases that allowed individual defendants to be sued in their official capacity for injunctive relief. *Id.* at 588 (citing *Harvey v. Blake*, 913 F.2d 226, 227-28 (5th Cir. 1990); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557-59 (11th Cir. 1987); *Canada v. Boyd Group, Inc.*, 809 F. Supp. 771, 779 & n.3 (D. Nev. 1992); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407, 410-11 (N.D. Ill. 1991)).

Interestingly, the majority also used the "individual in official capacity" argument to buttress the assertion that the purpose of the "agent" provision was to incorporate respondeat superior liability into Title VII. *Id.* at 587.

184. *Id.* at 589. Judge Fletcher cited 42 U.S.C. § 1981a(b)(3), which limits the damages for which an employer can be held liable, depending on the number of employees. In light of these damage limitations, Judge Fletcher was uncertain about the effect of the Civil Rights Act of 1991 in regards to the issue of individual liability under Title VII. *Miller*, 991 F.2d at 589. Nevertheless, Judge Fletcher implied that *Padway* should not be applied to claims occurring after the passage of the Civil Rights Act of 1991, because when *Padway* was decided, only backpay and reinstatement were available as remedies under Title VII. *Id.*

serted that the ADEA liability scheme is different from the liability scheme of Title VII. Therefore, the court should have analyzed the individual liability issue under the ADEA separately from the Title VII issue.¹⁸⁵ Citing *House v. Cannon Mills Co.*,¹⁸⁶ Judge Fletcher presented two notable differences between the two statutes. First, when the ADEA was enacted, the scope of relief under this act was much broader than the relief available under Title VII.¹⁸⁷ Second, the dissent asserted that “the ADEA incorporates the remedies and procedures of the Fair Labor Standards Act . . . , which differ from those under Title VII.”¹⁸⁸ Since individuals could be held personally liable under the FLSA,¹⁸⁹ the same result should apply to an ADEA action.¹⁹⁰

Judge Fletcher concluded that the *House* decision was “a thorough and well-reasoned opinion,”¹⁹¹ and therefore, its holding should be applied in cases where supervisors take part in the wrongful termination decision.¹⁹²

III. ANALYSIS

In refusing to hold individual defendants personally liable under either Title VII or the ADEA, the Court of Appeals for the Ninth Circuit narrowly interpreted acts that Congress intended to

185. *Id.*

186. 713 F. Supp. 159, 160 (M.D.N.C. 1988).

187. *Miller*, 991 F.2d at 589. “The difference in the scope of relief, in the *House* court’s view, foreclosed reliance on *Padway* in determining individual liability under the ADEA.” *Id.* The dissent also pointed out that the “construction of the limitations categories” of the Civil Rights Act of 1991 suggests that the damages available under the ADEA are still more expansive. *Id.* at 589 n.1.

188. *Miller*, 991 F.2d at 589 (quoting *House*, 713 F. Supp. at 160). In support of her proposition, Judge Fletcher cited the United States Supreme Court’s decision in *Lorillard v. Pons*, 434 U.S. 575, 582 (1978), which stated: “This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully [into the ADEA] the remedies and procedures of the FLSA.” *Id.*

189. See *supra* notes 109-10 and accompanying text.

190. *Miller*, 991 F.2d at 589. Judge Fletcher stated:

There is no question that an individual can be personally liable as an employer under the FLSA; adverse employment actions attributable to individuals as a consequence of their authority over employment decisions can lead to individual liability where those actions violate the FLSA. The same result should apply to actions brought under the ADEA.

Id. (citations omitted).

191. *Id.* Judge Fletcher stated that Judge Posner of the Court of Appeals for the Seventh Circuit cited *House* with approval in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990). *Miller*, 991 F.2d at 589 n.2.

192. *Miller*, 991 F.2d at 589-90.

be applied liberally.¹⁹³ The statutory language and the legislative intent of Title VII and the ADEA suggest that individual employees could be held personally liable under both Acts.¹⁹⁴ There are also strong arguments to suggest that individuals could be held personally liable under the ADEA independent of Title VII.

A. *The Plain Meaning of the Statutory Language Suggests that "Agents" Are "Employers"*

"Employer" is defined in both Title VII and the ADEA¹⁹⁵ to include agents of the employer.¹⁹⁶ Although "agent" is not defined by either Act, courts have found "agents" to be people with decision-making power¹⁹⁷ and significant control over the plaintiff's employment status.¹⁹⁸ Thus, supervisors who engage in discriminatory acts are "agents," and therefore "employers," under Title VII and the ADEA.¹⁹⁹

The Court of Appeals for the Ninth Circuit in *Miller* recognized that agents were included in the definition of Title VII and the ADEA. Nevertheless, the court refused to find agents to be "employers" for purposes of liability.²⁰⁰ Instead, the court stated that the "obvious purpose of this [agent] provision was to incorpo-

193. For cases supporting the liberal application of Title VII, see *supra* note 8 and accompanying text.

194. For Title VII background, see *supra* notes 24-46 and accompanying text. For ADEA background, see *supra* notes 47-61 and accompanying text.

195. For the purposes of parts A and B of this subsection, this Note will treat the definitions of employer under the ADEA and Title VII as the same.

196. See *supra* notes 62-66 and accompanying text for a discussion of the definition of "employer" under Title VII, and note 82 for the definition of "employer" under the ADEA. See also Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1258 (1991).

197. See *supra* note 90 and accompanying text.

198. See *supra* note 89 and accompanying text.

199. See Livingston, *supra* note 76, at 68-69. Including "agent" within the "employer" definition "provides a logical basis for concluding that Congress intended that owners, supervisors and other managerial personnel be subject to Title VII liability, including liability for compensatory and punitive damages, where they participated in discriminatory decisionmaking." *Id.*

200. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994). The court relied on *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982), as precedent that individuals could not be held liable for backpay. *Miller*, 991 F.2d at 587. However, the court in *Padway* did not give any authority for this determination, and its status as precedent is questionable since neither party in *Padway* briefed the issue of individual liability of agents. See Hirsch, *supra* note 167.

rate respondeat superior liability into" Title VII.²⁰¹ However, the court failed to offer any authority for this proposition.²⁰²

The plain language of the statute²⁰³ lends no support to the Ninth Circuit's interpretation. It is a recognized canon of statutory construction that when a word is defined in a statute, the definition applies throughout the act, regardless of how the word may be defined in common usage.²⁰⁴ The damages provisions of Title VII and the ADEA permit remedies against "employers."²⁰⁵ Thus, because the definition of "employer" includes agents, the damages provisions of Title VII and of the ADEA extend to hold agents liable.

Because the provision protecting against sex discrimination was a late addition to Title VII,²⁰⁶ courts have not frequently relied on legislative history in sex discrimination cases.²⁰⁷ Generally, courts have relied on the literal meaning²⁰⁸ and post-enactment history of Title VII for guidance.²⁰⁹ With the increased focus on legislative history in recent years, the plain meaning rule has been

201. *Miller*, 991 F.2d at 587 (alterations in original) (quoting *Miller v. Maxwell's Int'l*, 52 Fair Empl. Prac. Cas. (BNA) 1486, 1487 (N.D. Cal. 1990)).

202. *Cf. Vinson v. Taylor*, 753 F.2d 141, 148 (D.C. Cir. 1985), *aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) ("The legislative history of Title VII is virtually barren of indications, one way or another, of a vicarious responsibility for employers."); *see also Phillips*, *supra* note 196, at 1258 (stating that 42 U.S.C. § 2000e(b) "is an individual liability provision, not a vicarious liability provision under which agents' discriminatory actions are imputed to their employers").

203. The "plain meaning rule" states that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1299 (1975) (quoting *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929)).

204. *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979); *In re Perrotton*, 958 F.2d 889, 893 (9th Cir. 1992); 2A NORMAN J. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.07, at 151-52 (5th ed. 1992). *See, e.g., Reed Dickerson, Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125 (1983).

Even applying a common dictionary's definition, "employer" is defined to include agents with hiring authority. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 73, at 743.

205. *See supra* notes 42-46 & 77-81 and accompanying text for a discussion of the damage provisions of Title VII. *See supra* notes 60-61 and accompanying text for the damage provisions of the ADEA.

206. *See supra* note 34 and accompanying text.

207. *See Barbara L. Graham, Supreme Court Policymaking in Civil Rights Cases: A Study of Judicial Discretion in Statutory Interpretation*, in 3A SINGER, SUTHERLAND STATUTORY CONSTRUCTION 659 (5th ed. 1992).

208. *See supra* note 203 for the classic articulation of the plain meaning rule.

209. *Graham, supra* note 207, at 667.

subject to criticism.²¹⁰ Nevertheless, the plain meaning rule must be relied on in the absence of any applicable legislative history.²¹¹

The court in *Johnson v. Northern Indiana Public Service Co.*²¹² provided an interesting method by which Congress could choose to alter this provision in the future to permit individual liability: change "and any agent" to "or any agent."²¹³ Nevertheless, the court erred in refusing to find liability under the present reading of the statute. Under the present reading, "and any agent" simply means that an agent can be an "employer" in addition to the institutional employer. Under the *Johnson* court's reasoning, amending the statute to "or any agent" would allow plaintiffs to circumvent the minimum employee requirement that designates employers by seeking recovery from an agent. This agent could be the owner of a small company or a person likely to be indemnified by the company in a lawsuit.²¹⁴

B. *The Legislative History Is Inconclusive as to Congress' Intent Regarding Personal Liability*²¹⁵

Congress did not address the issue of individual liability during its debates over Title VII²¹⁶ or the ADEA.²¹⁷ Nevertheless, an examination of the legislative history suggests that Congress would favor individual liability for those directly responsible for acts of discrimination.

Title VII's history demonstrates a steady broadening of the scope of damages available to victims of discrimination. The Equal Employment Opportunity Act of 1972²¹⁸ expanded liability to in-

210. See generally Murphy, *supra* note 203 (discussing the merits of abandoning the plain meaning rule).

211. *Id.* at 1303. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Id.* (quoting *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945)).

212. 844 F. Supp. 466, 468 (N.D. Ind. 1994).

213. See *supra* notes 128-31 and accompanying text.

214. *Johnson*, 844 F. Supp. at 469.

215. If the language of a statute is unambiguous, that language is conclusive, absent clearly expressed legislative intent to the contrary. *Reves v. Ernst & Young*, 113A S. Ct. 1163, 1169 (1993); *Freytag v. Commissioner*, 501 U.S. 868, 873 (1991).

216. See *supra* notes 24-46 and accompanying text for a discussion of the background of Title VII.

217. See *supra* notes 47-61 and accompanying text for a discussion of the background of the ADEA.

218. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 5 U.S.C. §§ 5108 & 5314 and various sections of 42 U.S.C. § 2000e).

clude public employers as well as small employers.²¹⁹ The Civil Rights Act of 1991²²⁰ further expanded the scope of liability by permitting compensatory and punitive damages.²²¹ Furthermore, courts should liberally interpret Title VII to provide compensation for victims of discrimination.²²²

The court of appeals in *Miller* determined that Congress intended to exclude "small entities" by limiting liability to only those employers with fifteen or more employees.²²³ According to the court, Congress could not have intended for individuals to be found personally liable under Title VII.²²⁴ An examination of the legislative history, however, shows the flaw in the court's reasoning.²²⁵

Congress expanded the definition of "employer" in 1972 to apply to small businesses responsible for discriminatory conduct.²²⁶ By rejecting the portion of the House bill²²⁷ establishing the employee limit at eight, Congress compromised in order to satisfy those concerned with the effect on small business.²²⁸ The concern was that many small businesses were family run and that the owners were unfamiliar with the intricacies of federal law.²²⁹ Consequently, it would be improper to hold such businesses liable under Title VII.²³⁰

219. See *supra* notes 67-72 and accompanying text.

220. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C. §§ 1981 and 2000e).

221. See *supra* notes 75-81 and accompanying text.

222. See *supra* note 8 and cases cited therein.

223. *Miller v. Maxwell's Int'l*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994); *contra Bishop v. Okidata, Inc.*, 864 F. Supp. 416 (D.N.J. 1994) (finding small employers exempted from Title VII and the Americans with Disabilities Act because of undue burden on financial condition, but noting that individuals have always been liable for torts committed in the workplace, and, thus, should be subject to personal liability).

224. *Miller*, 991 F.2d at 587.

225. This reasoning is flawed when you consider that "employer" is defined to include "any person," and person is defined to include "one or more individuals." 42 U.S.C. § 2000e(b) (1988); 42 U.S.C. § 2000e(a) (1988). Under this interpretation, an individual that is engaged in an industry affecting commerce and supervises fifteen or more employees could be considered an employer. This individual could simultaneously be an agent of a larger entity, yet the individual could still be personally liable for his own discriminatory acts or those of his supervisory employees.

226. See *supra* notes 67-72 and accompanying text.

227. See H.R. 1746, 92d Cong., 2d Sess. (1971).

228. See *supra* note 69.

229. See Lamberson, *supra* note 5, at 427. Congress, in debating the limitation on the number of employees, focused on "the effect on the personal nature of small businesses and not to the financial hardship that might occur." *Id.* (citing 110 CONG. REC. 12,645-47 (1964)).

230. H.R. 1746, 92d Cong., 2d Sess. (1971).

It is highly unlikely that Congress was so subtle as to suggest that individuals should not be liable because they are "small entities." If this was Congress' intention, it could have placed the same number restriction on agents as it did on employers.²³¹ Furthermore, the availability of tort-like remedies²³² is additional evidence that Congress would approve finding discriminators liable.²³³

After presenting the basis for its opinion, the court in *Miller* attempted to reconcile its decision with other cases which found supervisors to be agents, liable only in their "official" capacities.²³⁴ Nevertheless, there is no evidence that Congress intended to limit agent liability in this way. Congress, in enacting the Civil Rights Act of 1991,²³⁵ permitted the awarding of compensatory and punitive damages, damages which are regularly held against individuals (as opposed to reinstatement and backpay).²³⁶ In addition, the "official/individual" distinction is flawed in light of the personal nature of discrimination. In situations where the employer has sufficiently distanced itself from the discriminatory act, finding supervisors liable only in their "official" capacities leaves victims of discrimination without a remedy.

Clearly, courts have raised important issues involving the imposition of compensatory and punitive damages under the frame-

231. See *supra* note 225.

232. The Court in *United States v. Burke*, 112 S. Ct. 1867 (1992), determined that Title VII remedies existing *prior* to the passage of the Civil Rights Act of 1991 (i.e., backpay, reinstatement and injunctive relief) were wage-like, not tort-like, for tax purposes. However, the Court did not address whether the Civil Rights Act of 1991, which permitted additional remedies of compensatory and punitive damages, would have an effect on this determination. *Id.* at 1872 n.8; *contra* 112 S. Ct. at 1878 (O'Connor, J., dissenting) ("[T]he remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce. The purposes and operation of Title VII are closely analogous to those of tort law, and that similarity should determine excludability of recoveries for personal injury [under the tax code].").

233. The court in *Miller* also pointed to the limitations for compensatory damages based on employer size as evidence that Congress did not intend to impose individual liability. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 n.2 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994). However, these damage provisions are likely to face court challenges. *CONTE, supra* note 4, at § 2.21 (Supp. 1993). Bills have also been submitted in the House and the Senate that would either eliminate completely or severely restrict these damage caps. See *supra* note 80.

234. 991 F.2d at 587; see *supra* note 169.

235. Congress did not amend the definition of "employer" in the Civil Rights Act of 1991, so arguably the congressional intent as to the interpretation of this statute is limited to its initial enactment and its subsequent amendment in 1972. The increase in available damages is only evidence as to what Congress' present intent may be on this issue.

236. See, e.g., *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1180 (S.D.N.Y. 1992); *contra* *Vodde v. Indiana Mich. Power Co.*, 852 F. Supp. 676, 680 (N.D. Ind. 1994).

work established by the Civil Rights Act of 1991.²³⁷ Congress needs to create a liability scheme for individuals that would be proportionate to the size of the supervisor's employer. The present scheme of liability for these damages is not indicative of congressional intent to preclude personal liability, but rather demonstrates that Congress did not contemplate the issue of individual liability at all. Congress has not "clearly expressed [a] legislative intent" contrary to the express reading of the statute. Therefore, the unambiguous language of the statute must control.²³⁸

The Supreme Court of the United States stated in *Meritor Savings Bank, FSB v. Vinson*²³⁹ that courts should apply common law agency principles in determining whether employers can be held liable for the discriminatory actions of their supervisors.²⁴⁰ At least one commentator has stated that the *Meritor* Court implied that supervisors could actually be held individually liable under Title VII.²⁴¹ However, supervisors cannot be considered agents²⁴² when acting outside the scope of employment.²⁴³ Thus, Title VII would not cover extreme forms of discrimination by employees for which courts would not find employers directly liable.²⁴⁴

Courts have had considerable difficulty in applying agency

237. See *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512 (M.D. Ala. 1994); see also *supra* notes 125-27 and accompanying text for a discussion of the *Saville* decision.

238. See *supra* note 215 and cases cited therein.

239. 477 U.S. 57 (1986).

240. See *supra* notes 133-39 and accompanying text for a discussion of the *Meritor* decision.

241. See 1 SULLIVAN, *supra* note 30, at § 8.7.4 ("[A]s the [*Meritor*] majority opinion suggests, the harassers are themselves liable because they remain agents of the employer and therefore are 'employers' within the meaning of Title VII."). Courts have also applied agency principles against supervisors individually. See *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 529 & n.3 (D.N.H. 1993); *Griffith v. Keystone Steel & Wire*, 858 F. Supp. 802 (C.D. Ill. 1994).

242. See *supra* note 137.

243. See Maria M. Carrillo, *Hostile Environment Sexual Harassment by a Supervisor Under Title VII: Reassessment of Employer Liability in Light of the Civil Rights Act of 1991*, 24 COLUM. HUM. RTS. L. REV. 41, 67 (1992-93).

Factors used in determining scope of employment include determining where the discriminatory act occurred, when the act occurred, and whether the act was foreseeable by the employer. See generally RESTATEMENT (SECOND) OF AGENCY §§ 217-32 (1958). Even if an act is explicitly forbidden by the employer, it may still be within the scope of employment. *Id.* at § 230. Section 235 provides: "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." *Id.* at § 235.

244. Arguably, this results in a "liability gap." See Kandel, *supra* note 6. However, courts are beginning to develop a common law tort of discrimination that may provide a remedy against supervisors individually. See Terry M. Dworkin et al., *Theo-*

principles in Title VII and ADEA cases.²⁴⁵ In fact, the *Meritor* Court itself stated that "such common-law principles may not be transferable in all their particulars to Title VII."²⁴⁶ Thus, the Court's statement that Congress' intent in establishing the "agent" provision was for courts to apply agency principles to determine when employers should be liable has not been well accepted in the legal community.²⁴⁷

C. *Individual Liability Under the ADEA*

Congress passed the ADEA in order to provide even stronger penalties for age discrimination than were available under Title VII. Congress did this because age discrimination was often more subtle and more widespread than sex or race discrimination. The ADEA from its enactment provided greater remedies, although small businesses were granted more immunity under the statutory provisions.²⁴⁸

Some courts have distinguished the ADEA from Title VII with regard to individual liability based on the ADEA's relation to the FLSA, which has widely been accepted to provide remedies against individual defendants.²⁴⁹ Although the ADEA's definition of "employer" more closely resembles the Title VII definition than it does the FLSA's,²⁵⁰ the *interpretation* of the ADEA definition of "em-

ries of Recovery for Sexual Harassment: Going Beyond Title VII, 25 SAN DIEGO L. REV. 125 (1988).

Notably, there has been a sharp increase over the past ten years of common law tort action against employers. See Ronald M. Green, *The Manager's Personal Liability in Issues of Employment Law*, II ALI-ABA COURSE OF STUDY MATERIALS: EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 927, 930 (1988). Common law causes of action frequently brought include assault and battery, defamation, intentional infliction of emotional distress, invasion of privacy, and false imprisonment. *Id.*; see also Brown & Abell, *supra* note 13, at pt. V(A).

245. See generally Phillips, *supra* note 196, at 1255 (stating that agency rules are poorly adapted to supervisor sexual harassment cases because the primary aim of these rules is to determine the principal's liability to third parties, not to their own employees); Lutner, *supra* note 134, at 598 & 599 ("The guidance offered by *Meritor* has proven inadequate . . . [and] lower courts have applied agency principles to hostile environment sexual harassment cases with varied results.").

246. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

247. See Lutner, *supra* note 134, at 602-08.

248. The definition of "employer" under the ADEA requires a minimum of 20 employees, 29 U.S.C. § 630(b) (1988), compared to Title VII's minimum of 15 employees. 42 U.S.C. § 2000e(b) (1988).

249. See *supra* notes 109-10 and accompanying text.

250. Compare 29 U.S.C. § 630(b) (1988) (quoted in full *supra* note 82) with 42 U.S.C. § 2000e(b) (1988) (quoted in full *supra* note 66) and 29 U.S.C. § 203(d) (1988) (quoted *supra* note 84).

ployer" is distinguishable from Title VII.

In the *Miller* dissent, Judge Fletcher argued that liability under the ADEA should be distinguished from liability under Title VII.²⁵¹ Adopting the holding in *House v. Cannon Mills Co.*,²⁵² Judge Fletcher argued that the ADEA expressly and impliedly incorporated the FLSA remedy provisions and the case law that accompanies them.²⁵³ Thus, "the clear import of the statutory language" of the ADEA suggests that employee supervisors should be personally liable.²⁵⁴

A review of the statutory language of the ADEA, the legislative history of the Act, and the subsequent case law strongly suggests that if individual liability is found under Title VII, such liability should also be found under the ADEA (assuming the employer has more than twenty employees). Even without Title VII liability, it seems clear that individuals can be held liable under the ADEA. By incorporating the remedies of the FLSA, the ADEA also acquired the interpretations of the remedy provisions accorded under the FLSA, including the establishment of individual liability.²⁵⁵

Nevertheless, because of the similarities between the definition of "employer" under the ADEA and Title VII, many courts continue to hold that the two statutes should be given the same interpretation with regard to this issue. The FLSA definition, establishing an employer as "any person acting directly or indirectly in the interest of an employer,"²⁵⁶ is broader, but nonetheless comparable, to the ADEA's agent provision. Looking to common interpretations of "agent," one dictionary defined an agent as "one that acts for or in the place of another by authority from him."²⁵⁷ The court in *House* affirmed that although the ADEA did not "expressly incorporate" the FLSA definition, the two definitions are

251. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 589 (9th Cir. 1993) (Fletcher, J., dissenting), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994).

252. 713 F. Supp. 159 (M.D.N.C. 1988).

253. *Miller*, 991 F.2d at 589. The *Miller* court rejected the *House* opinion on the basis that it was decided prior to the enactment of the Civil Rights Act of 1991, which created damages similar to those available under the ADEA. *Id.* The majority also rejected the adoption of case law interpreting the "employer" definition since the ADEA does not explicitly incorporate the FLSA definition. *Id.* at 588 n.3.

254. *Id.* at 589 (citing *House*, 713 F. Supp. at 161-62).

255. Of course, the FLSA provides no guidance in determining individual liability under Title VII.

256. 29 U.S.C. § 203(d) (1988).

257. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 73, at 40.

comparable.²⁵⁸

CONCLUSION

In light of the history and interpretations of Title VII and the ADEA, the Court of Appeals for the Ninth Circuit erred in concluding that individual supervisors could not be held personally liable for acts of discrimination.²⁵⁹ The plain meaning of the definition of "employer" under both Title VII and the ADEA suggests that "agents" are to be considered employers for the purposes of the acts.²⁶⁰ The damages provisions of both acts provide remedies against "employers."²⁶¹ Since the legislative intent is ambiguous as to whether individuals can be held liable, the clear statutory language controls. Finally, courts have found individual liability under the ADEA based on its relationship with the FLSA.

Cases such as *Miller v. Maxwell's International, Inc.* demonstrate the importance in finding individual liability under circumstances where the victim of discrimination cannot otherwise be made whole. Finding supervisors liable will create a "front line defense" against discrimination.²⁶² Although Congress needs to establish a proper measure of compensatory and punitive damages to be assessed against supervisors,²⁶³ victims of discrimination are

258. *House v. Cannon Mills Co.*, 713 F. Supp. 159, 160 n.1 (M.D.N.C. 1988).

259. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied sub nom. Miller v. La Rosa*, 114 S. Ct. 1049 (1994).

260. 42 U.S.C. § 2000e(b) (1988); 29 U.S.C. § 630(b) (1988).

261. *See* 42 U.S.C. § 2000e-5(g) (Supp. V 1993); 42 U.S.C. § 1981a (Supp. V 1993); 29 U.S.C. § 626(b) (1988); *see supra* notes 42-46, 60-61, 77-81, and accompanying text.

262. *Williams*, *supra* note 13, at 218. "Supervisors and managers provide the front line defense against employment discrimination for the institutional employer. Personal liability provides a greater incentive for the individual supervisor to guarantee a discrimination-free workplace." *Id.*

263. *See* Theodore F. Claypoole, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1169 (1987).

Congress should create a federal cause of action against the harassing employee Assignment of personal liability to any supervisory employee who sexually harasses a nonsupervisory employee, and holding the harassing employee responsible for equitable, compensatory, and punitive relief would prove most effective. Allowing such penalties strikes at the heart of sexual harassment by forcing employees to be personally accountable for their own actions in the workplace. The severity of the penalties serves as a punishment for socially unacceptable behavior and a warning to other employees.

Id.

still entitled to adequate compensation from those capable of paying.

Steven K. Sanborn

